NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS

September 12, 2007

The President
The White House
Washington, DC 20500

Dear Mr. President:

The National Council of Agricultural Employers appreciates your commitment to undertake regulatory and administrative reform of the H-2A program to make it more useable for agricultural employers who may have their labor supply threatened as a result of the recently promulgated Social Security "no-match" rulemaking. On August 28, 2007 we communicated our recommendations on critically needed administrative reforms of the program, most of which can be implemented immediately and without additional rulemaking. With this letter we communicate our recommendations for needed H-2A reforms that can only be done through the more time consuming rulemaking process.

The NCAE is the only national association representing agricultural employers. Our members represent the vast majority of U.S. agricultural employment, including most major users of the H-2A program. Our members have had decades of experience with the H-2A and predecessor programs, and are well aware of the problems with the program and the urgent need for improvement.

While streamlining the H-2A program regulations will not be a substitute for congressional enactment of statutory reforms which the NCAE has strongly supported for years, nor will it be a substitute for the administrative reforms requested in our prior letter, the regulatory reforms suggested in this letter will help U.S. farmers deal with the impact of the Administration's border and interior enforcement initiatives and the anticipated impact of the no-match regulation.

The regulatory reform measures outlined in this letter are, in our view, very reasonable given the well-documented fact that the vast majority of hired farm workers are illegal aliens, and that U.S. workers have better economic alternatives and prefer those alternatives. The rule changes will not adversely affect the small number of U.S. workers who prefer to work in agriculture. More importantly, they will protect the jobs of the much larger number of U.S. workers employed in the upstream and downstream jobs that are dependent on a healthy, competitive U.S. agricultural industry – good jobs

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which are now threatened by the fact that U.S. farm products are becoming uncompetitive in global and even domestic markets and production is rapidly moving outside the U.S.

The no-match rule will begin affecting agriculture in mid-January 2008, in the middle of the winter harvest season in southern states. Its effects will quickly move northward. Therefore, implementing the regulatory changes outlined below in addition to the administrative changes urged in our prior letter that can be made immediately is imperative.

Department of Labor

Three federal departments are involved in the H-2A program, and improvements are needed in all three departments. However the greatest need is to reform the Labor Department's regulations for granting H-2A labor certifications. These regulations have changed little in more than 30 years. For the most part, the current H-2A regulations are the same regulations that were promulgated on an interim basis in 1987, following enactment of the Immigration Reform and Control Act. The 1987 regulations, in turn, were changed little from the agricultural H-2 regulations adopted in the mid-1970s.

The current H-2A regulations are predicated on woefully outdated assumptions with respect to the demographics of the U.S. agricultural work force and labor supply and U.S. agricultural labor markets. The two principal assumptions underlying the H-2A labor certification regulations are (1) that U.S. agricultural wages and working conditions are significantly depressed by the presence of aliens in the U.S. agricultural workforce, and (2) that there is a significant supply of unemployed domestic workers who are ready, willing and able to perform hired farm work. Neither of these assumptions is even remotely true, nor have they been for many years. Yet the current labor certification process requires employers to jump through the same administrative hoops year after year, proving over and over again that neither of these assumptions is correct. Substantial amounts of governmental resources and personnel time are also consumed in this useless process. It is significant in this regard that virtually all of the H-2A job opportunities for which employers seek H-2A certification are ultimately certified, after employers and government bureaucrats jump through these hoops. This has been the case for decades. In FY 2006, for example, 92 percent of job opportunities for which H-2A certification was sought, were certified.

The following changes in the USDOL H-2A regulations are urgently needed:

1. Convert the labor certification process to an attestation process.

The replacement of the labor certification process with an attestation process has been successful in streamlining the H-1B program. There is even more justification for adopting it in the H-2A program. With the government's own statistics showing that the vast majority of hired farm workers nationwide, and virtually all persons newly entering

the hired farm work force, are illegal, the process of proving in each individual case that there are not sufficient able, willing and qualified legal U.S. workers to fill the available agricultural jobs is absurd. Employers should be permitted to file a labor certification application offering the required terms and conditions of employment and, if the application is complete and meets USDOL standards, it should be immediately certified. Domestic farm workers would be assured access to available jobs by including as one of the attestation requirements a promise that the job opportunities for which certification is requested will be included in a job offer filed with the appropriate state work force agency, that the job opportunities will be advertised in the local labor market, and that the employer will offer the job opportunities to all qualified eligible workers who apply until the time the worker's alien workers depart their place of residence to come to work for the employer.

We are aware that some attestation programs have been associated with unacceptable levels of fraud and abuse. However, none of these programs include a compliance monitoring and enforcement component. In marked contrast, the H-2A program includes a substantial monitoring and enforcement component, both within the ETA regulations at 20 CFR 655, Subpart B, and also within the Labor Standards regulations at 29 CFR Part 501. This compliance monitoring and enforcement has proven very effective in assuring employer compliance with the terms and conditions of the H-2A program. Its effectiveness will be unaffected by whether these obligations are incurred through a labor certification process or an attestation process.

2. Use the Secretary of Labor's discretion in the Immigration and Nationality Act (INA) to broaden the regulatory definition of "agriculture" to correspond with USDOL's definition of agriculture in the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).

The INA gives the Secretary of Labor discretion to broaden the definition of "agriculture" beyond the activities mandated in the statutory definition. The Secretary should use this discretion to extend the scope of the H-2A program to additional activities. The Secretary has already defined "agriculture" more broadly in the MSPA at 29 CFR 500.20(e) to include the "handling, planting, drying, packing, packaging, processing, freezing or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state." These activities should also be added to the definition of "agriculture" in the H-2A regulations. In addition, as recommended in our letter of August 28, 2007, all activities normally performed by workers whose primary duties are agricultural as defined by the definition suggested herein should be considered eligible to be performed by workers on an incidental basis if the workers' primary duties are agricultural.

3. Redefine the Adverse Effect Wage Rate (AEWR) as the wage rate paid to the majority of workers (51st percentile) in the specific occupation for which the employer is seeking H-2A certification in the area of intended employment.

The current AEWRs are a significant barrier to entry into the H-2A program for farmers employing workers in which the market competitive wage is below the AEWR. Under the current AEWR methodology, AEWRs, which are the minimum wages that must be paid by farmers employing H-2A aliens, have risen to levels that far exceed the minimum wage in non-agricultural occupations, and even exceed the actual wage in many non-agricultural occupations in rural labor markets. For example, the 2007 AEWRs range from $8.01 per hour in Arkansas, Louisiana and Mississippi to a high of $9.88 per hour in Illinois, Indiana and Ohio, and average $9.15 per hour for the U.S. as a whole. These wage rates are above the prevailing wages in many agricultural occupations and, combined with the other above-market costs imposed by the H-2A regulations, make the program economically unavailable to many farmers.

The notion that agricultural wages are depressed by the presence of aliens in the agricultural labor market, and that AEWRs are necessary to offset such depression, is belied by the facts. If the premise that an AEWR above the prevailing wage was necessary to prevent wage depression from the employment of aliens was true, agricultural wages should have been nearly stagnant for the past twenty years, since the proportion of illegal aliens in the agricultural work force has been large and growing throughout this period. However, the facts are that not only have agricultural wages not been stagnant during this period, the average field and livestock worker wage has risen more rapidly in agriculture than it has for civilian non-agricultural workers during this period, even though the proportion of illegal aliens in the civilian non-agricultural work force is substantially lower than in agriculture. Therefore, there is no valid basis for requiring a wage higher than the prevailing wage in the specific occupation and area of intended employment as a condition for employing H-2A aliens.

Furthermore, U.S. farmers are in direct competition with foreign producers in both domestic and foreign agricultural commodity markets for almost every agricultural commodity produced in the U.S. The U.S. farm wage structure is part of a globally-determined competitive cost structure. If wages are set at artificially high levels for agricultural occupations in the U.S., this will not result in increasing domestic farm worker wages, but rather in shifting market share for high labor cost commodities from U.S. to foreign producers. Farm wages in agricultural occupations will not remain at artificially high rates longer than it takes for this adjustment in market share to take place. In globally competitive markets, it is simply not possible to set wages in one country at levels that are higher than globally competitive wages on a sustained basis. Therefore, setting AEWRs above prevailing wages is ultimately a futile exercise, and will result in reducing U.S. agricultural production rather than protecting U.S. farm wages. The U.S. farm wage data over the past two decades amply demonstrates this reality.

Finally, it should be noted that every other temporary non-immigrant and permanent immigrant worker program, including the requirements for permanent immigration of persons employed in farm work, requires only the payment of the prevailing wage in the occupation in the area of intended employment.

4. Eliminate the so-called 50-percent rule, which is unfair to both U.S. farmers and alien farm workers.

The current H-2A regulations require farmers to hire any qualified U.S. worker who applies for an H-2A certified job opportunity until the point where 50 percent of the period of employment for which H-2A certification has been granted has elapsed. This requirement continues even if the employer's job opportunities are filled with H-2A workers who have already been admitted to the U.S. and are on the job. No other non-immigrant program has such a punitive requirement, and there is no justification for it in the agricultural setting. Employers should be required to employ qualified domestic workers who apply only until their H-2A aliens have begun traveling from their homes to the employer's place of employment.

5. Permit employers to make reasonable charges for the cost of housing maintenance and utilities.

Lack of available housing is one of the greatest current impediments to expansion of the H-2A program. The cost of providing housing is also one of the largest cost hurdles in expanding the program. Current USDOL H-2A regulations magnify this obstacle. USDOL currently does not permit any charges to be made for housing, including any charges for maintenance and utilities. Again, no other non-immigrant alien worker program requires employers even to provide housing, much less to provide it at no cost. The H-2A regulations should be amended to permit employers to charge reasonable amounts for housing maintenance and utilities, as an inducement to increase the housing stock as well as to reduce the cost of providing this benefit. It would not be difficult to administer a requirement that charges for maintenance and utilities be based on actual costs and be capped at a maximum amount, similar to the current H-2A requirement that charges for meals be based on actual cost if they exceed a threshold amount.

6. Eliminate conflict between federal and state/local farm labor housing regulations.

As noted above, lack of available housing is one of the greatest current impediments to expansion of the H-2A program. One of the obstacles to the rapid expansion of the farm worker housing stock is conflicting federal and state/local housing regulations applicable to farm worker housing. Current H-2A regulations require employers to comply with all applicable regulations. The housing regulations should be changed to require on-farm housing to comply only with federal farm labor housing regulations. Given that the federal government has determined that these regulations are sufficient to ensure safe and decent housing for farm workers, there can be no argument that these regulations are inadequate. On the other hand some state/local farm labor housing regulations seem designed to preclude such housing rather than protect workers.

We note that the H-2A provisions of the INA already includes language that "preempt[s] any State or local law regulating admissibility of nonimmigrant workers." *De facto* regulation through housing or other requirements should also be pre-empted.

Department of Homeland Security

The major impediment to use of the H-2A program which is within the purview of the Department of Homeland Security is its regulatory interpretation of the term "temporary". As presently interpreted, almost all jobs in the dairy, livestock and poultry sectors fall outside the scope of the H-2A program, and many jobs in the crop sector, or in areas of the country which have year 'round growing seasons, are precluded. These precluded sectors comprise a substantial amount of the illegal alien employment in agriculture.

1. Reinterpret the definition of "temporary" to include persons temporarily admitted to perform any agricultural occupation.

Historically the Immigration and Naturalization Service and now the DHS have operated on a restrictive interpretation of the "temporary" language in section 101(a)(15)(H)(2)(*A*) of the INA. This section authorizes the temporary admission of aliens to perform agricultural labor or services on a temporary or seasonal basis. This so-called double temporary standard has been interpreted to mean that both the stay of the alien must be temporary and the need for the alien's services must be temporary or seasonal. The regulations define an H-2A alien's stay to be temporary if it does not exceed three years. However, an employer's need for a worker is determined not to be temporary if it exceeds one year. If the job opportunity the alien will fill is expected to continue beyond one year, it can not be filled by an H-2A alien even for one year, because the need is determined not to be temporary. It should be noted that the one year and three year criteria are entirely regulatory interpretations not codified in the INA.

It would be an entirely reasonable interpretation that an employer's need for a worker in an on-going job opportunity is "temporary" if the employer has been unable to fill the job opportunity with a permanent worker. The employer therefore needs to temporarily fill the job opportunity until a permanent worker who is able, willing, qualified and legally authorized to work can be found. We urge the Department to reinterpret the temporary criterion to permit employing H-2A aliens in any agricultural job opportunity until a permanent, work-authorized worker can be found.

2. Allow a limited employment authorization for H-2A aliens seeking to extend their status pending adjudication of a non-frivolous extension petition.

Petitions to extend the stay of named H-2A beneficiaries who are already in the U.S. typically take 60 to 90 days to adjudicate. Employers often do not know which workers are willing to extend their stay, nor whether there will be certified job opportunities for them to fill, in sufficient time to file extension petitions that far in

advance. In particular, H-2A certification decisions are not even made until 30 days in advance of the date of need, so a petition to extend the stay of an alien to fill such a job opportunity is almost never adjudicated by the date of need. The DHS should amend the H-2A regulations to grant an automatic limited extension of stay, during the pendency of a petition for an extension, if accompanied by a valid labor certification. There is precedent for such a regulation in the H-1B program, where an alien is work authorized upon the filing of a petition to extend the alien's stay, until the petition is adjudicated.

Other Needed Changes

There are several additional changes that must be done by formal rulemaking that are needed to assure that the H-2A program can meet the needs of agricultural employers adversely affected by the no-match regulation. These issues either cross Departmental lines or are outside the jurisdiction of the Departments of Labor, Homeland Security and State which have direct administrative responsibilities over operational portions of the H-2A program. Nevertheless, these issues are very important to creating a fully workable program.

1. Find a way for first-time applicants for H-2A visas with otherwise clean records who have worked illegally in the U.S. in the past to obtain an H-2A visa.

We noted in the introduction to our August 28 letter that well over half of the current agricultural work force is working illegally in the U.S. while currently less than 2 percent of agricultural employment is H-2A workers. While some of these workers have now put down roots in the United States and are, in effect, illegal permanent residents, many seasonal agricultural workers are non-immigrants. They are in the U.S. only for limited periods to perform agricultural work and return to their permanent homes in Mexico. We strongly urge the Departments of Homeland Security and State, in conjunction with the White House, to find a way to permit these permanent residents of Mexico who have had intermittent illegal presence in the United States, but who are truly international migrants and retain their permanent residence in Mexico, to be admitted legally as H-2A workers, notwithstanding prior illegal presence. It is patently impractical and unrealistic to expect U.S. agriculture to forego more than half of its existing work force and replace them with new workers who have never been illegally present in the U.S. before and are inexperienced in U.S. agriculture. Unless this problem can be solved quickly, the impact of any other administrative and regulatory reforms will be severely diminished.

We are not addressing here the issue of the status of permanent residents of the United States who entered illegally. We are not asking that the non-immigrant intent requirement for H-2A non-immigrants be waived. We are merely seeking a way for farm workers who have been international migrants in the past to continue that work pattern under the protection of the H-2A program.

2. Find a way to permit H-2A aliens to be housed in farm worker housing constructed in whole or in part with Section 514 Farmers Home Administration (FmHA) funding.

As noted at several points in our letters, the extremely limited stock of available farm worker housing is one of the greatest impediments to rapidly increasing the H-2A program. Yet H-2A aliens can not presently be housed in housing financed in whole or in part with Section 514 FmHA farm worker housing money. This restriction takes a significant portion of the currently existing farm worker housing stock off the table. We ask that the relevant agencies seek a way for H-2A aliens to occupy such housing. If no such regulatory solution to this problem can be found, we request the administration's support for the necessary statutory change to make this possible.

3. Narrowly interpret and enforce the "present in the United States" requirement for using Legal Services Corporation (LSC) grant money to fund actions against H-2A employers on behalf of H-2A aliens.

The threat of expensive litigation brought by Legal Services Corporation farm worker legal services grantees is one of the major impediments to many farmers in seeking H-2A workers. Unfortunately, much of this litigation is brought for the purpose of harassment, and to discourage use of the program, rather than to protect workers or correct abuses. There are some legal services grantees whose virtually only litigation targets are H-2A users. Participation in the H-2A program is known to mark an employer as a target for lawsuit abuse subsidized by taxpayer funds. Many cases are frivolous, or involve matters which could and should have been settled without litigation, or involve matters which have already been investigated by federal or state enforcement personnel and been resolved or in which the agency declined to penalize the employer. An increasing number of these cases are brought on behalf of H-2A aliens.

The applicable statute and regulations governing LSC grantees limits them to representing H-2A aliens who are "present in the United States". However, this requirement has been compromised to the point where it now requires only that the alien ever have been present in the United States, and permits bringing cases long after the fact. There are now some well-documented incidents where personnel of LSC grantees have gone into Mexico openly soliciting clients on the promise of winning money for them.

To end this lawsuit abuse, the relevant federal agencies need to narrowly construe and effectively enforce the requirement of actual presence of the alien in the United States at the time LSC funded actions are brought. The relevant agencies also need to closely monitor LSC grantees that "specialize" in H-2A cases to assure that the cases brought are meritorious, and that all reasonable efforts to bring about an acceptable settlement short of litigation have been undertaken.

We will be happy to discuss and elaborate on any or all of the issues raised in this letter with the relevant administration officials, and to assist in any way we can to make

the H-2A program more effective in meeting the needs of U.S. farmers for a legal, affordable and sufficient work force while protecting the employment opportunities, wages and benefits of those domestic workers who choose to work in agriculture.

Sincerely yours,

Sharon M. Hughes, CAE
Executive Vice President

cc Barry Jackson
Sec. Michael Chertoff
Sec. Condolezza Rice
Sec. Elaine L. Chao
Sec. Carlos Gutierrez